

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1698

UNITED STATES OF AMERICA, PETITIONER

v.

CECIL J. BISHOP

***ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT***

REPLY BRIEF FOR THE UNITED STATES

Three comments may be made with respect to the brief in opposition filed by respondent: (1) it disregards the specific holding below, which supports the "lesser included offense" basis of decision by approving conviction of a tax misdemeanor involving turpitude, 26 U.S.C. 7207, on the basis of merely negligent conduct; (2) it erroneously deduces from this Court's decisions that all tax misdemeanors involve a lesser degree of willfulness than is necessary to support a conviction of the tax felony charged here under 26

U.S.C. 7206(1); and (3) it incorrectly states the position taken by the government in opposing certiorari in cases involving convictions under tax misdemeanor provisions other than 26 U.S.C. 7207.

1. Respondent offers no justification for the decision below, which finds the misdemeanor a lesser included offense by concluding that conviction of a misdemeanor involving turpitude may be sustained on the basis of mere negligence or "careless disregard." It is important to bear in mind that the term "willfully" is used here as part of a specific statute, in its setting; thus, discussions of the level of culpability that may be sufficient for misdemeanor convictions under general principles of criminal law are not on point. Here, the interpretation given to this term by the court below ignores its context—specifically the language of the statute, 26 U.S.C. 7207, which speaks of "willful" conduct with respect to statements or documents which are "known" by the defendant "to be fraudulent or to be false" in a material way. Neither respondent nor the court below makes any effort to reconcile a volitional standard of mere carelessness with the statutory requirement of knowledge of falsity, and it is submitted here that they are irreconcilable. The terminology employed in the statute implies not mere carelessness but design and intent to deceive. In such a context it cannot be assumed that Congress used the term "willfully" to apply to something less than intentional conduct.

2. The decision of the court below was based on its view that all misdemeanors involve a lesser degree

of willfulness than do tax felonies, and respondent contends (Br. in Opp. 2-4) that this view is not only supported by *United States v. Murdock*, 290 U.S. 389, and *Spies v. United States*, 317 U.S. 492, but is not in conflict with *Sansone v. United States*, 380 U.S. 343. Both of these propositions are erroneous.

Murdock involved a prosecution for the misdemeanor of willful failure to supply information for purposes of the computation of a tax, in violation of a predecessor of 26 U.S.C. 7203, and this Court held that the requirement of willfulness in that statute made "bad faith or evil intent" (290 U.S. at 389) an element of the offense. Similarly, in *Spies*, this Court insisted on "some element of evil motive" (317 U.S. at 498) as an element of the tax misdemeanor of willfully failing to pay a tax (26 U.S.C. 7203).¹ Thus the underlying rationale of the decision below, *i.e.*, that conscious intent is an element of tax felonies but not of tax misdemeanors, is in conflict with, and not supported by, *Murdock* and *Spies*. Nor is that rationale supported by *Sansone*, for, as the Third Circuit correctly observed in *United States v. Vitiello*, 363 F. 2d 240, 243, this Court in *Sansone* prescribed the

¹ In the same paragraph of the *Spies* opinion, the Court approved "[m]ere voluntary and purposeful" conduct as the standard of willfulness for the tax misdemeanor of willful failure to file a tax return, in violation of 26 U.S.C. 7203. It is clear, therefore, that this Court has interpreted the requirement of "willfulness" in light of the particular nature of the activities Congress sought to prohibit and not on the basis of an arbitrary distinction between misdemeanors and felonies.

same volitional standard of conscious intent for both the felony of willfully attempting to evade tax (26 U.S.C. 7201) and the misdemeanor of willfully failing to pay a tax when due (26 U.S.C. 7203).² See *Sansone*, *supra*, 380 U.S. at 350-352; see also Pet. 6-8.

3. Contrary to respondent's claim (Br. in Opp. 5-7), the government's opposition to certiorari petitions in earlier cases is not inconsistent with the present contention that "careless disregard" is an inappropriate and unauthorized standard of willfulness under 26 U.S.C. 7207. Two of the cases cited by respondent involved convictions for willfully failing to file tax returns, in violation of 26 U.S.C. 7203, under a standard of "voluntary, purposeful, deliberate and intentional conduct." *Matosky v. United States* (No. 1350, O.T. 1969), certiorari denied, 398 U.S. 904; *Fahey v. United States*, (No. 576, O.T. 1969), certiorari denied, 396 U.S. 957. The standard of willfulness ap-

² Although respondent hesitates to acknowledge the existence of a conflict among the courts of appeals (Br. in Opp. 5), both the Third Circuit in *Vitiello* and the Fifth Circuit in *Haner v. United States*, 315 F. 2d 792 (C.A. 5), have noted that their decisions conflict with the decision of the Ninth Circuit in *Abdul v. United States*, 254 F. 2d 292, on second appeal, 278 F. 2d 234, certiorari denied, 364 U.S. 832, upon which the Ninth Circuit relied in this case. Furthermore, while respondent suggests (Br. in Opp. 4-5) that the decision below is not clearly in conflict with *Escobar v. United States*, 388 F. 2d 661 (C.A. 5), certiorari denied, 390 U.S. 1024, because the Fifth Circuit might still adopt a lower standard of willfulness in tax misdemeanor cases, it is clear from the Fifth Circuit's decision in *Haner* that it has rejected the Ninth Circuit's standard of "careless disregard."

plied in those cases was approved by the government in its briefs in opposition, and we continue to urge a standard of conscious, intentional conduct.

The third case cited by respondent, *Abdul v. United States* (No. 104, O.T. 1960), certiorari denied, 364 U.S. 832, involved a conviction for willful failure to file a tax return in violation of 26 U.S.C. 7203; the jury charge had included a volitional standard of "careless disregard." In our brief in opposition, the government did not seek to defend the "careless disregard" instruction but rather noted that the jury charge had included language giving forceful emphasis to the necessity of finding intentional and purposeful conduct; in our view, the additional language relating to "careless disregard" was not prejudicial error in that context.³

For the reasons stated above, and in our petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

³ Respondent argues (Br. in Opp. 5) that the government contended in its brief in opposition to certiorari in *Abdul* that there was no conflict among the circuits. However, the *Haner* and *Vitiello* cases, which created a conflict among the courts of appeals on the issue of the propriety of "careless disregard" instructions, were not decided until after certiorari was denied in *Abdul*.